Supreme Court of the United States

Nos. 774 and 775

BRIEF FOR RESPONDENT PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

Nos. 774 and 793

SHELL OIL COMPANY, TEXAS GAS EXPLORATION CORPORATION, J. RAY MCDERMOTT & CO., INC., CALLERY PROPERTIES, INC., OCEAN DRILLING & EXPLORATION COMPANY, HUMBLE OIL & REFINING COMPANY, AMERADA PETROLEUM CORPORATION, KERR-MCGEE OIL INDUSTRIES, INC., CAROLINE HUNT SANDS and LOYD B. SANDS, SOCONY MOBIL OIL COMPANY, INC., BECK OIL COMPANY, *et al.*, PHILLIPS PETROLEUM COMPANY, UNION OIL COMPANY OF CALIFORNIA, TIDEWATER OIL COMPANY, CONTINENTAL OIL COMPANY, PAN AMERICAN PETROLEUM CORPORATION, THE CALIFORNIA COMPANY, KILROY PROPERTIES, INC., *et al.*, BEL OIL CORPORATION, RICHARDSON & BASS (Louisiana Account), and MISSISSIPPI RIVER FUEL CORPORATION,

HOPE NATURAL GAS COMPANY, TEXAS GAS TRANSMISSION CORPORATION, and TEXAS EASTERN TRANSMISSION CORPORATION,

Petitioners,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Respondent.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF FOR RESPONDENT PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK IN OPPOSITION.

Question Presented.

In the light of decisions by this Court in *Catco*[1] and *Transco-Seaboard*,[2] did the Court below err in setting aside August 10, 1959 unconditional certificates of public convenience and necessity issued by the Federal Power Commission to producers under Section 7 of the Natural Gas Act, for sales from southern Louisiana fields at initial prices of 23.55¢ per Mcf when

(1) the record before the Commission did not contain the supporting evidence of price propriety which *Catco* requires for an unconditional certification, *and*

(2) the Commission had not even instituted the proceedings, in compliance with this Court's *Catco* remand order, wherein it was adjured to question the propriety of the Catco-sponsored price level (22.4¢ per Mcf) and, in the absence of evidence to support it, to condition the certificates at a non-suspect, lower price line?

Statement of the Case.

1. The Nature of the Proceeding Before the Federal Power Commission.

The order of the Federal Power Commission (FPC) reversed by the Court of Appeals decision here the subject of applications for review, was issued in a consolidated proceeding involving 29 related applications for certificates of public convenience and necessity under Section 7(c) of the Natural Gas Act. Twenty-six of the certificates were

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[1] *Atlantic Refining Co.* v. *Pub. Serv. Com'n*, 360 U. S. 378 (June 22, 1959).

[2] *Pub. Serv. Com'n* v. *Fed. Power Com'n*, 361 U. S. 195 (December 14, 1959).

requested by producers of natural gas, petitioners in No. 774, for authorization of sales to Hope Natural Gas Company (Hope) from fields located in and offshore the coast of southern Louisiana.[3] The remaining three certificates were sought by Hope, the purchaser, and by Texas Gas Transmission Corporation (Texas Gas) and Texas Eastern Transmission Corporation (Texas Eastern), petitioners in No. 793.

Hope is a subsidiary of the Consolidated Natural Gas Company, a public utility holding company parent of an integrated natural gas system. The Consolidated System, through its several subsidiaries, engages in the production, purchase, transmission, and wholesale and retail distribution of natural gas. It renders gas service, directly and indirectly, through sales to other distribution companies, to many communities in the State of New York among others. Prior to the instant transactions, approximately 70% of the System's total natural gas supply was purchased, at the various delivery points on the System, from three major transcontinental transmission companies (including Texas Eastern, one of the two transporter applicants in this proceeding) whose lines originate in the southwestern gas producing states. The balance of its supply was derived from Appalachian gas producing sources (R. 39).

The proposal in this proceeding marked the Consolidated System's first effort to purchase gas directly from southwestern producers. Since the System does not have transmission facilities of its own extending to the southwestern producing fields, it was necessary to arrange for transportation service by others. Arrangements were made to have the gas transported by Texas Gas from the Louisi-

[3] Petitioners in No. 774 include 2 of the Catco and 5 of the Transco-Seaboard producers.

ana fields of origin to Ohio, and from there to the various final delivery points on the System by Texas Eastern. Both transporters are major interstate pipeline companies. For reasons that will be made to appear *infra*, it is important to note carefully that, although Hope was the member company of the Consolidated System selected to be the "purchaser" of the gas, none of the gas actually was to be carried by or delivered to Hope itself. Instead, it was all to be delivered directly by Texas Eastern to other member companies of the System—Hope's "customers" (R. 49-50; Pet. in No. 774 at p. 5, ftn. 2 and Pet. in No. 793 at pp. 3-4).

The transportation charges of the two pipeline companies totalled 21.3¢ per Mcf (R. 79, as subsequently modified). The propriety of the certificates issued to them and to Hope, the purchaser, was not contested in the proceeding before the Commission or in the case below.

The proposed charges of the natural gas producers totalled 23.55¢ per Mcf for most of the gas to be sold and 23.05¢ per Mcf for the balance (approximately 5%). These prices included an amount, 2.05¢ per Mcf in each instance, ascribed to "tax reimbursement". In addition, all of the contracts contained clauses calling for periodic, automatic price increases of 1¢ per Mcf every four years and for complete redetermination of price after an 8 or 12-year period, upon the average of the highest prices then being paid under other gas sale and purchase contracts in the area (R. 30-31, 70-71).

Thus, the total cost of this gas, to be delivered directly by Texas Eastern to the various members of the Consolidated System, for Hope's account, was to be in excess of 44¢ per Mcf. The System's then current average expenditure for southwestern produced gas, purchased from and delivered by pipelines to the same member companies, was approximately 37.5¢ per Mcf (R. 50, 74 [J.A. p. 3258-

3261]). However, an important feature of the inter-company arrangement that designated Hope (which would neither receive, transport, deliver nor even see this gas) as the "purchaser", was the plan to bill the actual distributees of the gas under Hope's rate schedule rather than at its delivered cost (R. 49). That rate schedule, calling for charges higher than the delivered cost of this gas, previously had been applicable to gas actually—i.e., physically—acquired by Hope, by purchase or production, and then stored, otherwise serviced, transported, delivered and resold by it to other members of the System to meet their peak load requirements and for similar purposes (R. 38, 49). No explanation for the extension of that rate schedule to the present, purely nominal "service" (billing only) to be performed by Hope was offered on the record before the Commission. The effect of this arrangement, however, was to permit the Commission and the producer-petitioners herein to indulge, and to ask the Court to indulge with them, in the comforting but utterly transparent illusion that, although the cost of this gas to the Consolidated System would be more than 7¢ above the System's existing average cost of southwestern-produced, pipeline-purchased gas, taken at the very same delivery points, nevertheless the present purchase would cause no "adverse" financial impact.[4]

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[4] However, even the intricacies of intra-System billing procedures could not make that illusion seem plausible for long. Of course, this purchase promptly did cause an "adverse" financial impact—as must any purchase at 44¢ plus by a member of an affiliated system which formerly paid 37.5¢ for the very same commodity, in the very same condition, at the very same delivery points. If any conceivable confusion on the subject could have been engendered at the time by the complexities of the billing arrangements, it was quickly dispelled by Hope's next succeeding rate increase filing. That filing, contrary to the producer-petitioners' assertion, not only was "related" to the costs of the instant supply, but reflected them in full. See Pet. in No. 774, p. 6, ftn. 5.

2. The Setting in Which the Commission's Order Was Issued.

We believe that a most significant feature of this case is the setting in which the Commission's decision was issued. The FPC order granting unconditional certificates of public convenience and necessity to the producer-petitioners herein for natural gas sales at initial prices up to 23.5¢, was entered on August 10, 1959. The proceeding had its origin a year earlier.

The gas sales contracts underlying the producer certificate applications before the Commission were negotiated and executed by Hope and the producer-petitioners between August and December, 1958 (R. 70-71). More than a year earlier, on June 24, 1957, the Commission had issued its now-notorious third Catco order, unconditionally certificating producer sales at the then unprecedented initial price level in southern Louisiana of 22.4¢ per Mcf.[5]

As this Court is well aware, for the ensuing two-year period (from June 24, 1957 to June 22, 1959) "the price certificated [in Catco became] the floor for [subsequent] contracts in the area."[6] A leading illustration of that development and of the accuracy of the Court's observation was another group of contracts, with which the Court is also quite familiar. On September 4, 1958, at the threshold of the negotiation period of the Hope gas purchase contracts, the Commission had unconditionally certificated another large array of southern Louisiana contracts (the Transco-Seaboard sales) at initial prices up to 23.3¢ per Mcf.[7] At the same time, again as this Court is aware, the Commission was evolving, in uncontested (and therefore unappealable)

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[5] *Continental Oil Co.*, 17 F.P.C. 880.

[6] *Catco, supra*, at p. 390.

[7] *Transcontinental Gas Pipe Line Corp.*, 20 F.P.C. 264.

proceedings, a rationale to furnish justification (a) *ex post facto* for the final results achieved by its own Catco decision of June 24, 1957 and (b) *in futuro* for the latter's rapidly multiplying successors and counterparts.

According to the Commission's *pre*-Catco decisions and first two Catco orders, the burden of proving that public convenience and necessity required certification of the sale at his proposed price rested upon the high price seller-applicant. Evidence that that price was the product of arm's-length negotiation with the buyer did not adequately discharge the burden. According to the Commission's *post*-Catco decisions, however, the high price seller-applicant entered the proceeding with an automatic "*prima facie*" case (which proved, in practice, to be an irrebuttable and conclusive case) in favor of unconditional certification at his proposed price, simply by virtue of the existence of a "market for the gas" (i.e., a buyer willing to pay) at that price.[8]

This was the regulatory climate in which the Hope gas purchase contracts were negotiated during the summer and fall of 1958. The effects of this philosophy and of its results, on the conduct of these contract negotiations, were graphically described by the buyer's negotiating witness.

> "I would like to say about the second or third day of June we started operating to try to purchase gas in the South Louisiana area to acquire an amount of about 100 million a day and after travelling around

[8] See, e.g., *Seaboard Oil Co.*, 19 F.P.C. 416 and *Hope Natural Gas Co.*, 19 F.P.C. 405 (March 31, 1958). These cases, and the regulatory philosophy they embody, were brought to the Court's attention in several of the *Catco* briefs. See, e. g., Nos. 518 and 536, October Term, 1958 (*Catco*), the Petition for Certiorari (November 24, 1958) at p. 16 and the Brief (February 26, 1959) at pp. 24, 26, 30 and 36 of Tennessee Gas Transmission Company, the Brief (April 1959) at pp. 94 and 97 of FPC as Amicus Curiae and the Brief of PSC (April 9, 1959) at pp. 37-38 and 61.

and calling on any number of people and discussing contracts with them and after having been in the territory for two and a half years I knew that the prices under which contracts were being purchased were from 17 cents to 25 cents and I called on in total about fifty companies and after calling on about ten and getting very cold shouldered without mentioning any price at all, because I did not want to get thrown out the door and I wanted to stay in if I could, and I called on the Spur [Superior?] Oil Company and they told me that they just could not discuss it because they sold their gas right at that time at 21.5 cents.*

"I called on several other people who were dealing with trunk lines [Trunkline?] and they were getting 22 cents.* After calling on the biggest purchaser that we made there three times I offered him 21 and a half cents"* (R. 45; ftns. supplied).

* Ex-tax.

The regulatory climate in which the hearing before the Commission was held is equally revealing. On May 22, 1959, the eve of the hearing, a new pinnacle was reached in the uninterrupted—as yet—ascent of producer initial prices. Acting on a record utterly devoid of supporting evidence, the FPC unconditionally authorized producer sales in southern Louisiana at initial prices of 24.05¢ per Mcf.* In the aura of that decision, the hearing before the Commission in the present case opened on the following June 10. It continued in nine consecutive sessions, except for weekends, until June 22, 1959 (Catco Day). After a two-

* *Trunkline Gas Co.*, 21 F.P.C. 704. This decision occupied center-stage in the *Transco-Seaboard* case. See Nos. 459 and 473, October Term, 1959. PSC's Petition for Certiorari (October 9, 1959) at p. 26 and Brief in Reply (December 4, 1959) at p. 3; and Transcontinental Gas Pipe Line Corporation's Brief in opposition (undated) at p. 29. PSC's appeal from the denial of its intervention and from the final order in *Trunkline* was dismissed for purely procedural reasons. *Public Serv. Com'n v. Fed. Power Com'n*, 284 F. 2d 200 (D.C. Cir., April 28, 1960).

day recess, the hearing was resumed on June 25 for the sole purpose of completing cross-examination of Hope and Texas Gas witnesses and introducing testimony of one FPC staff witness (R. iii, 48-69).[10]

In the earlier days of the hearing, witnesses for the producer-petitioners testified in support of the prices. They stated that the initial price provisions of their contracts with Hope were the product of arm's-length negotiation. A few proffered the additional information—only to well-known to everyone acquainted with post-June 24, 1957 southern Louisiana initial price conditions—that similar prices had been offered by others for the supplies involved in this proceeding, or that similar prices were being received by themselves or by other producers under other recently executed southern Louisiana gas sale contracts (R. 1-28). Some of the producers frankly admitted that the latter factor had predetermined their initial price floor in embarking on negotiations with Hope (R. 16, 25-26, 27). This fact, as indicated above, was emphatically corroborated by Hope's negotiating witness.

Upon Hope's motion, the intermediate decision (by the Presiding Examiner) procedure was eliminated. After oral argument on July 21, 1959, the proceeding was submitted to the Commission for decision. By that date, the Commission had before it for decision several other proceedings of the same general type—i.e., producer certificate proceedings, in which hearings had been concluded prior to June 22, involving proposed southern Louisiana sales at initial prices

[10] It is apparently on the basis of this final session, at which no producer witness even took the stand, that the producer-petitioners dispute the Court of Appeals' perfectly accurate observation that "the evidence [in support of the producer prices] was taken before the Court's [*Catco*] opinion was rendered"; and repeatedly make the utterly misleading claim that the hearing concluded "*three days after Catco was announced by this Court.*" Pet. in No. 774 at p. 8, emphasis in original, and at pp. 3, 4, 9 and 22.

equal to or higher than Catco's. In each instance the proposed initial prices had been justified by the same kind of evidence (only) as that presented in this record—i.e., evidence of arm's-length negotiation and of the incidence, since June 24, 1957, of similar prices for other sales in the area. The Commission had issued no decisions in proceedings of this kind since the rendition of this Court's *Catco* opinion on June 22. Its last major pre-*Catco* determination had been the aforementioned *Trunkline* decision of May 22.

Into this tense atmosphere, on August 4, 1959, burst the decision of the Court of Appeals for the Third Circuit in the *Transco-Seaboard* case.[11] It was to have prompt and far-reaching repercussions.

Almost immediately—within six days—the Commission issued decisions in all six of its pending southern Louisiana producer certificate cases, including the present one.[12] In each it unconditionally authorized initial prices equal to or higher than Catco's. In each it acted on a record barren of justification for those prices, except for evidence of arm's length negotiation and of similar prices in the same area. In each it professed, exactly as had the Third Circuit in its

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[11] *United Gas Improvement Co.* v. *Fed. Power Comm.*, 269 F.2d 865.

[12] On August 7, 1959 it issued a decision in *South Georgia Natural Gas Co.*, 22 F.P.C. 211. No appeal was taken in that case because opponents of the producer prices would not have been permitted to intervene in order to acquire standing for appeal. Under FPC's intervention rulings (presently under review in *Pub. Serv. Com'n* v. *Fed. Power Com'n*, D.C. Cir. Nos. 15366, 15854 and 15910, argued March 13, 1961) PSC has been barred from high price certificate proceedings such as *South Georgia*, where the purchaser is not a New York-serving pipeline. On August 10, in addition to the decision in the instant case (R. 87-110), FPC issued decisions in *The California Co.*, 22 F.P.C. 252 (subject of the decision reprinted in Appendix C to the Pet. in No. 774); *Sunray Mid-Continent Oil Co.*, 22 F.P.C. 361 (Appendix D); *Sun Oil Co.*, 22 F.P.C. 351 (first part of Appendix E) and *The Superior Oil Co.*, 22 F.P.C. 369 (second part of Appendix E).

Transco-Seaboard decision of August 4, to have been guided by and to be giving effect to this Court's *Catco* teachings. In its decision in the instant proceeding, it took the occasion to announce that, in line with this interpretation and this unique method of implementing *Catco*, FPC would *not* require the proof of public convenience and necessity, demanded by this Court in respect of Catco's 22.4¢ initial prices, for any initial prices up to and including 24.05¢ per Mcf.[13]

Intervenors, including the Public Service Commission of the State of New York (PSC), filed applications for rehearing of each of the Commission's August 10 certificate decisions. On October 7, 1959, all of these applications were denied.

3. The Setting in Which the Decision Below Was Issued.

PSC's petition for review in the instant case was filed in the Court below on December 4, 1959. Petitions for review of the Commission's four other August 10 certificate decisions were filed in the Courts of Appeal for the Fifth (2 cases), Ninth and Tenth Circuits at about the same time. PSC was admitted as an intervenor in support of the petitioner (The United Gas Improvement Company—a Pennsylvania distribution company) in each of the latter appeals.

As the result of an unusual sequence of events, however, this Court was afforded a preview of the Commission's August 10 certificate decisions long before they were reached or considered by any of the directly reviewing

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[13] "We shall consider any new application based upon a price in excess of any price we have heretofore certificated [*i.e.*, *Trunkline's* 24.05¢] to be 'out of line' and shall require conclusive proof from the applicant that the public convenience and necessity requires certification at that price" (R. 105).

Courts. On October 9, 1959, only two days after the Commission's denial of the applications for rehearing of its August 10 decisions, PSC filed a petition for certiorari for review of the Third Circuit's decision in the *Transco-Seaboard* case. Both PSC's petition and the briefs of the respondents submitted in opposition thereto cited, summarized and relied upon the Commission's August 10 certificate decisions to support their respective positions in that case. PSC urgently emphasized that the effect of the Third Circuit's decision was to permit and to encourge the undermining of the essential point and purpose of the *Catco* remand, and demonstrated the accuracy of that assertion by reference to the August 10 certifications.[14] FPC and its Transco-Seaboard associates, on the other hand, offered those certifications as affirmative evidence that the Commission had "faithfully" embarked upon the discharge of its *Catco*-imposed responsibilities. They urged that there was, therefore, no occasion for this Court to grant certiorari in another producer initial price case.[15] This Court's decision, *granting* the petition and *summarily vacating* the Third Circuit's determination and *remanding* that proceeding to the Commission for further action in conformity with *Catco*, was issued on December 14 (361 U.S. 195).

Nevertheless the Commission and the petitioners herein proceeded with the defense of the August 10 certificate decisions in the Court below and in the other Courts of Appeal on precisely the same theories they had unsuccessfully advanced to this Court in *Transco-Seaboard*. To com-

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[14] Nos. 459 and 473, October Term, 1959. See PSC's Petition for Certiorari (October 9, 1959) at p. 26; Brief in Reply (December 4, 1959) at p. 3.

[15] *Ibid.* See Brief of FPC in Opposition (November, 1959) at pp. 20-22 and Brief of Transcontinental Gas Pipe Line Corporation in Opposition (undated) at p. 29.

plete the circle they now re-advance essentially the same theories to this Court in the present applications. They maintained below—and still maintain—that the Commission's August 10 certifications represent, reflect and evidence the faithful discharge of its *Catco*-imposed responsibilities. They construed—and still construe—*Catco* not only to *permit*, but indeed to *support* the Commission's findings, on August 10, 1959, that 21.4¢ to 23.8¢ initial prices were "in line"—because they were similar to Catco's, to Transco-Seaboard's, to each others and to various others certificated by the Commission since June 24, 1957—and therefore, unlike the Catco prices themselves, in need of no other, better, additional or independent demonstration of their compatibility with the public convenience and necessity. They construe this Court's *Transco-Seaboard* decision to mean nothing at all.

Of course, the Court below disagreed with these contentions, as did each of the other three Courts on review of the Commission's August 10 certificate decisions. On August 10, 1959 the remanded Catco proceeding had not even opened. On December 8, 1960 the Commission's decision in that proceeding had not yet been issued.[16] In order to preserve the integrity—indeed, the very essence—of the *Catco* remand, the Court below properly held, as did each of the other three, that the Commission could not issue unconditional authorization for initial prices equal to or above the Catco levels "without the supporting evidence which that case [*Catco*] requires" (Pet. in No. 774, at p. 31). We do not believe the Court below or any of the others could properly have held otherwise.

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[16] At the present date the Catco hearing on remand has concluded and the proceeding has been submitted to the Presiding Examiner for intermediate decision.

No hearings have been set in the remanded Transco-Seaboard proceeding.

Reasons for Denying Writ.

Introduction.

PSC would not presume to elaborate to this Court on the proper interpretation to be accorded its *Catco* and *Transco-Seaboard* decisions. We would simply note that, on June 22, 1959, the Court spoke at length on the subject of FPC's regulatory obligations with respect to high priced producer sales. On December 14, 1959, in a case involving the same subject and the same issues, the Court was compelled to speak again, in order to preserve the purpose and effect of its June 22 pronouncement and mandate. On December 8, 1960, the Court below—and on October 31, 1960 and January 23 and February 22, 1961, respectively, the Courts of Appeal for the Ninth, Tenth and Fifth Circuits —again in cases involving the same subject and the same issues, were also called upon to speak in such a way as to prevent the further attempted nullification of this Court's June 22, 1959 decision. They did so, unanimously and harmoniously.

We believe and respectfully submit that the decision below and the companion decisions by other Circuits are so obviously correct, so patently in accord, in substance, with each other and with *Catco* itself, as to eliminate any excuse for asking this Court to speak again, for the third time in less than two years, on the same matter. Neither the decision below, nor any of its companions, has created or given rise to new questions concerning the "meaning of *Catco* and the authority of the Commission under *Catco*" (Pet. in No. 774, p. 10 *et seq.*). On the contrary, the Court below and its sister Circuits have simply completed the task begun by this Court on December 14, 1959. That decision removed the Third Circuit's unfortunate *Transco-Seaboard* gloss upon *Catco*. These decisions have removed

the same unfortunate gloss added by the Commission in the wake and on the inspiration of the Third Circuit's opinion. The total effect has been to restore *Catco* to its original tenor, meaning and import.

At present count, the message of the *Catco* case has been underscored, emphasized, reiterated and judicially rescued from attempted emasculation on no less than 6 succeeding occasions. As a result, the FPC, at least, apparently is no longer in doubt as to the "meaning" of *Catco* or the scope of its authority thereunder. *It* does not seek review here of any of the multi-circuit, *Catco*-applying pronouncements.

However, despite the repeated and unanimous attempts by this Court and the Courts of Appeal to clarify and re-emphasize that meaning, by striking down every effort to elevate the southern Louisiana initial price plateau to or above the Catco and Transco-Seaboard levels, pending some showing, some time, somewhere, on some record, that those levels themselves are in the public interest and required by the public convenience and necessity, petitioners still seek another opportunity (their eighth) to relitigate the same point. To persuade this Court to re-reconsider the subject (for the third time), they have

(1) endeavored to camouflage their own adamant refusal to accept the import of the *Catco* decision under a claim that the teachings of that case somehow have been obscured rather than simply reaffirmed by the decision below;

(2) attempted to manufacture alleged conflicts and inconsistencies between the decision below and the decision in *Catco* and/or cognate decisions by other Courts of Appeal; and

(3) purported to detect other alleged errors in the decision below, of such novelty and magnitude as to demand the attention of this Court.

We respectfully submit that each of these asserted grounds for the request for certiorari is manifestly baseless.

1. The Decision Below Has Clarified, Rather Than Muddied, the *Catco* Waters.

On June 22, 1959 this Court remanded the *Catco* case to the Commission for further proceedings, as indicated in its opinion, because the evidence in that record was inadequate to demonstrate the "reasons why" public convenience and necessity required proposed southern Louisiana sales to be made at initial prices of 22.4¢ per Mcf. Six weeks later, the Commission held that the instant proposed southern Louisiana sales (and others) at initial prices of 23.55¢ per Mcf (and more) could and should be certificated unconditionally because such prices had become "in line" and therefore were in need of no other explanation of the "reasons why" they were required by public convenience and necessity. The decision in the instant case was entered on a record which, for all relevant purposes—i.e., so far as the evidence in support of the producer prices *per se* was concerned—had been compiled in its entirety before this Court's June 22 opinion served notice that the Natural Gas Act required evidentiary support for unconditional certifications at these price levels. It was entered only six days after a perfect inspiration had been provided by the Third Circuit's *Transco-Seaboard* decision for the Commission's holding that it could dispense with the requirement of evidentiary support for 23.55¢ prices. It was entered before hearings in the remanded *Catco* proceeding had even begun—i.e., before *any* evidence had been introduced in *any* record to show the "reasons why" initial prices as high as 22.4¢ were required by public convenience and necessity. The finding that 23.55¢ prices were "in line" was based principally upon their comparability to

the overturned Catco prices themselves and to others which had been authorized by the Commission, under the same defective standards, prior to June 22, 1959.

In the case below and its analogs in the other Courts of Appeal, PSC asked, rhetorically, what conceivable purpose was to be served by the *Catco* remand, if FPC was permitted on August 10 to exempt the instant Catco successors from the same evidentiary or price conditioning requirement this Court had imposed on Catco itself but six weeks earlier. For what conceivable reason, we asked, had this Court demanded that additional proof be furnished to support the propriety of Catco's 22.4¢ prices, if the Commission, promptly thereafter, could regard initial prices of 23.55¢ or 23.8¢ as "in line" and therefore subject to no more than the same minimal evidentiary standard held inadequate to support Catco's unconditional certification?

Petitioners did not—we submit could not—attempt to furnish reasonable answers to these questions. Instead, they simply insisted that the *Catco* decision not only permitted but affirmatively supported, the continued issuance to them of unconditional certificates for unsupported initial prices at 23-24¢ levels, even before the inception of the remanded Catco or Transco-Seaboard proceedings wherein producers were to endeavor to support *by evidence* the propriety of 22.4¢ or 23.34¢ levels, if they could, *or* to be issued price-conditioned certificates, if they could not.

The Court below and each of its sister Circuits disagreed. If this Court's order of remand in *Catco* was (or is) to serve any useful purpose, if the remanded Catco proceeding to be held pursuant to that order was (or is) to retain any meaningful function, that purpose and that function could not be undermined at the outset by additional unconditional certifications of Catco-plus initial prices upon deficient-as-Catco evidentiary records.

We respectfully submit the decision below does not pose new "questions" for petitioners, concerning the meaning and effect of *Catco* or the scope of the Commission's authority with respect to high unsupported producer initial prices. It simply provides them with answers they are still reluctant to accept.

2. There Are No Conflicts or Inconsistencies Between the Decision Below and *Catco* and/or Cognate Decisions by Other Courts of Appeal.

Perhaps the most persuasive evidence of the harmony between the decision below, its companion decisions by other Courts of Appeal and the *Catco* opinion itself, is the distortion petitioners have felt called upon to commit in order to support their claims of conflict. Petitioners purport to believe that the effect of the decision below and one or more of the decisions by the other Courts of Appeal would be to convert a certificate proceeding under Section 7 of the Natural Gas Act into a "just and reasonable rate proceeding" under Section 4 or 5. They purport to credit that notion to two premises:

> (1) that "the Court below . . . could not have set aside the Commission's order unless it felt that proof of justness and reasonableness of the initial price was a prerequisite to unconditional certification"; and
>
> (2) that "the Court of Appeals construes Catco's 'tenor' to require a producer-applicant to prove that his proposed [initial] price *'is the lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest'*." (Pet. in No. 744 at p. 15, emphasis in original.)

It is unnecessary, of course, to belabor the point that petitioners' premises are not only incorrect but utterly and obviously unwarranted by anything said or done by the

Court below or any other Court. That much is instantly apparent from the most cursory reading of the decision itself. The Court below, like each of its sister Circuits, expressly, specifically and categorically stated that "the Act does not require a determination that proposed initial rates are 'just and reasonable' in the sense of Sections 4 and 5" (Pet. in No. 744 at p. 29).[17] It then quoted, from this Court's own *Catco* opinion, its words to the effect that the essential purpose and intent of the Natural Gas Act, *as a whole*, is to insure the interstate sale of natural gas at just and reasonable prices. (*Ibid.*, at p. 32).

Petitioners' persistence in deducing, from all such observations, that any concomitant judicial reversal of unconditional certificates issued to them for sales at totally unsupported initial prices, amounts to a *sub rosa* holding that the underlying certificate proceeding must, as a matter of law, assume the aspect of a rate proceeding, does not, we submit, furnish an adequate or even a rational basis for their petitions.

Fo similar reasons, we believe petitioners' claim of inconsistencies between the Circuits is likewise unfounded. Not only did each of the Courts, and 11 of the 12 judges, reach the same result but each succeeding decision cited with approval or actually quoted from those that preceded it. We acknowledge that there is a difference in language and style between the Courts, but we do not believe that originality of expression by United States Courts of Appeal invites review by this Court.

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[17] In fact the Court below preceded even this Court in that ruling. See *Florida Economic Advisory Council* v. *F.P.C.*, 251 F.2d 643 (D.C. Cir., 1957) *cert. den.*, 356 U.S. 959 (1958) and *Oklahoma Natural Gas Co.* v. *F.P.C.* 257 F.2d 634 (D.C. Cir., 1958).

3. The Court Below Did Not Err in Rejecting the Catco Progeny or a Few, Atypical, Improperly Trended pre-1957 Prices As Adequate Support for the Propriety of Petitioners' Demanded Prices.

In petitioners' view the Commission's finding that their demanded prices were "in line" and thus unconditionally certifiable without record support of their compatibility with the public interest or public convenience and necessity, was buttressed by "substantial evidence" of two categories (Pet. in No. 744 at pp. 14, 22).

As we have noted above, the first category of such "substantial evidence" comprised the producer sales, including the Catco sales themselves, certificated by the Commission (1) between June 24, 1957 and June 22, 1959, in accordance with its automatic-*prima facie*-case-in-favor-of-any-price-demanded regulatory philosophy or (2) immediately after August 4, 1959, under the inspiration of the Third Circuit's *Transco-Seaboard* decision. As we have indicated, a great many of these reference points were themselves at the time under judicial review. Each, when reviewed on the merits, was reversed. The attempt to justify one erroneous certification of sales at unsupported initial price levels by reference to other erroneous certifications of sales at equally unsupported initial price levels, in our view represents the epitome of the "boot straps" technique. If permitted here it would render this Court's *Catco* and *Transco-Seaboard* decisions and orders of remand pointless and futile.

More important than all of this, however, for the purpose of the present petitions, is the fact that each and every one of the Commission's post-1957 certificate decisions offered by these petitioners as evidence of an "in line" price level equal to their own, was brought to the

attention of this Court, for the very same purpose, by the respondents in the *Transco-Seaboard* applications for certiorari.[18]

Petitioners' second category of "substantial evidence" relates to three groups of pre-1957 producer sales (Pet. in No. 774 at pp. 22-24). Those contracts provided for initial prices of 20¢ per Mcf. However, with indicated embellishments they are now advanced in justification of initial prices of 23.55¢.

One of these groups of contracts was entered into in 1953, before this Court's *Phillips* decision apprized FPC of its regulatory jurisdiction over producer prices.[19] Another was certificated immediately after *Phillips*, but the Commission acted on a pre-*Phillips* record and in accordance with pre-*Phillips* standards. The third was a cursorily treated mimic of the first two. They elicited from the Commission, at the time of their certification, expressions of serious misgiving as to the deleterious consequences portended by prices of that magnitude.[20] That these prices were atypical, that they were attributable solely to unique

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[18] Nos. 459 and 473, October Term, 1959, Brief of FPC in Opposition (November 1959) at pp. 10-22 *passim* and Brief of Transcontinental Gas Pipe Line Corp. in Opposition (undated) at pp. 21-24 and 28-30.

PSC takes no position on the propriety of the level of price-conditioned certificates issued by the Commission for sales in areas other than southern Louisiana (see FPC decisions cited in Pet. in No. 774 at pp. 18-19), some of which are presently under judicial review. Moreover, apart from noting that several producers have accepted such conditioned certificates, we believe those decisions are here irrelevant, since it is undisputed that in southern Louisiana, the most important and prolific gas producing area in the nation and the source of both the Catco and Transco-Seaboard gas, no price reducing conditions have ever been imposed though certificates have been issued at proposed prices up to and including 24.05¢ per Mcf.

[19] *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672 (1954).

[20] *Gulf Interstate Gas Co.*, 12 F.P.C. 116 (1953) and *American Louisiana Pipe Line Co.*, 6 PUR 3d 476 (1954).

and unusual circumstances, is attested by the fact that, but for these *3* groups, not one of the literally *hundreds* of other producer sales contracts in the area, certificated by the Commission from 1954 until June 24, 1957, called for initial prices above 18¢ per Mcf. These 3, of course, had not been held to the evidentiary standards subsequently announced by *Catco* for out of line producer initial prices. Nor have their prices yet—after 7 years—been shown or found to represent "just and reasonable" rates.

Nevertheless these 3 sales alone, without reference to the pre-1957 certifications at 18¢ or below (under which by far the greater proportion of interstate gas flowed), were here deemed by the Commission to reflect "the 'pre-Catco' level of prices in southern Louisiana" (R. 104). Then, to compound that error, the Commission purported to trend those 20¢ prices upward on the basis of generalized economic data—data which neither petitioners nor any one else had introduced into the record and which no one has ever shown, or even alleged, to be remotely applicable to their operations. By this process the Commission confirmed its conclusion that petitioners' prices were "in line." Petitioners would now have the Court accept that gratuitous Commission performance as "substantial evidence" and as a demonstration of the faithful discharge of the Commission's duty to devote "most careful scrutiny and responsible reaction to initial price proposals of producers." *Catco*, p. 391.

Again, however, PSC believes that the inherent infirmities of "evidence" of this kind are less important, for present purposes, than the fact that the very same high price producer sales, offered by the present petitioners as evidence of "the 'pre-Catco' level of prices in southern Louisiana", were offered to this Court, for the very same

purpose, in *Catco* itself.[21] Yet this Court there properly observed that it was the Catco and post-Catco certifications (not the 3 pre-Catco 20¢ atypical certifications) which occasioned the "vault" of the southern Louisiana price line "from 17 cents [not 20¢] to over 23 cents per MCF." 360 U. S. 390.

Conclusion.

We respectfully submit that it is too late in the day for petitioners to attempt to reargue *Catco* and *Transco-Seaboard*. Evidence which was not deemed sufficient by this Court to demonstrate the propriety of unconditional certification of initial price levels of 22.4¢ and 23.3¢ per Mcf in those cases, was properly, indeed mandatorily, deemed insufficient by the Court below to demonstrate the propriety of unconditional certification of petitioners' initial price levels of 23.55¢ per Mcf. It is, therefore respectfully suggested that the petitions for certiorari be denied.

Respectfully submitted,

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Dated: March 29, 1961.

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[21] Nos. 518 and 536, October Term, 1958. See Petition for Certiorari (November 24, 1958) at p. 9, ftn. 7 and Brief (February 26, 1959) at p. 9, ftn. 10, of Tennessee Gas Transmission Company and Reply Brief of Catco companies (May 16, 1959) at p. 4. See also PSC's Brief (April 9, 1959) at pp. 22-23, 28-36.

In addition, they were cited and summarized in the briefs of petitioners and PSC in the Court below and in the briefs of PSC and the affected producers in each of the four related appeals.